90-1415

No.

Supreme Court, U.S.
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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1990

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION;
JAMES J. JURA, as Administrator;
JAMES WATKINS, as Secretary of the Department of Energy
of the United States of America; and
the United States of America,
Respondents.

CROSS-PETITION OF PUGET SOUND POWER & LIGHT COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal proprietary agency's interpretation of its governing statutes is entitled to the same deference afforded to an independent regulatory agency when the proprietary agency's interpretation (a) allows it to earn greater revenues than an alternative interpretation that is more consistent with the statutory language and (b) departs from its prior policy which was a contemporaneous interpretation of the statutes.

2. Whether the court of appeals erred in holding that the Bonneville Power Administration's ("BPA's") Long-Term Policy for allocating access to interregional power transmission lines, which withholds for BPA (without regard for BPA's actual needs) transmission capacity for short-term sales which could be used by others, is consistent with 16 U.S.C. §§ 837e, 838d and 839f(d) that require BPA to make available to non-federal utilities transmission capacity which is not required for the transmission of federal energy.

3. Whether the court of appeals erred in holding that BPA's policy, which forbids access to Puget Sound Power & Light Company for long-term sales on interregional power transmission lines, is not arbitrary and capricious, an abuse of discretion or in excess of BPA's statutory authority.

LIST OF PARTIES

Petitioners in the consolidated proceedings to review BPA's Long-Term Intertie Access Policy included California Energy Commission ("CEC"), California Public Utilities Commission ("CPUC"), Pacific Gas and Electric Company, Department of Water and Power of the City of Los Angeles, Public Service Department of the City of Burbank, Public Service Department of the City of Glendale, Water & Power Department of the City of Pasadena, Southern California Edison Company and San Diego Gas & Electric Company. All these petitioners are also petitioners seeking certiorari in Docket No. 90-1256, filed February 4, 1991.

Other petitioners and petitioner-intervenors included: Puget Sound Power & Light Company;[1] Washington Water Power Company, Pacific Northwest Generating Company and the Direct Service Industrial Customers (Vanalco, Inc., Aluminum Company of America, Columbia Falls Aluminum Company, Georgia-Pacific Corporation, Intalco Aluminum Corporation, Kaiser Aluminum & Chemical Corporation, Northwest Aluminum Company, Oregon Metallurgical Corporation, Pennwalt Corporation and Reynolds Metals Company).

Respondents in the proceedings below were Bonneville Power Administration, James J. Jura as Administrator of BPA; James Watkins as Secretary of the Department of Energy of the United States of America; and the United States of America. The following parties intervened as respondents in the proceedings below: Association of Public Agency Customers; Public Power Council; Public Utility District No. 1 of Chelan County, Washington; PacifiCorp, dba Pacific Power and Light Company; Public Utility District No. 2 of Grant County, Washington; Western Public Agencies Group; Montana Power Company; City of Seattle, City Light Department; Public Generating Pool; Eugene Water & Electric Board; Direct Service Industrial Customers; Portland General Electric Company; ARCO; Nongenerating Public Utilities; and Northwest Power Planning Council.

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[1] Puget Sound Power & Light Company has no parent company and no non-wholly owned subsidiaries. Puget's wholly owned subsidiary, Hydro Energy Development Corporation, has a non-wholly owned subsidiary named Hydro West Group, Inc.

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of the United States of America; and
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CROSS-PETITION OF
PUGET SOUND POWER & LIGHT COMPANY
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Puget Sound Power & Light Company ("Puget") hereby cross-petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 909 F.2d 1298 (9th Cir. 1990). The opinions in two earlier related

cases are reported at *California Energy Resources Conservation & Development Comm'n. v. Bonneville Power Administration*, 831 F.2d 1467 (9th Cir. 1987), *cert. denied*, 488 U.S. 818 (1988), and *Department of Water & Power v. Bonneville Power Administration*, 759 F.2d 684 (9th Cir. 1985). These three cases are reproduced at Appendices A, B and C to the Petition for a Writ of Certiorari filed by the California Energy Commission, *et al.*, on February 4, 1991 (Docket No. 90-1256) (appendices hereafter referred to as "CEC App.").

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion and judgment on July 26, 1990. The court denied a petition for rehearing on October 5, 1990. CEC App. D. On December 21, 1990, Justice O'Connor entered an order extending the time for the California Energy Commission, *et al.*, to file their petition for certiorari to February 4, 1991. Puget received its copies of the petition submitted by California Energy Commission, *et al.*, on February 6, 1991, and, under Supreme Court Rule 12.3, Puget's cross-petition is due by March 8, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PRINCIPAL STATUTES INVOLVED

Section 7 of the Act of August 31, 1964, 16 U.S.C. § 837e, provides, in pertinent part:

> Any capacity in Federal transmission lines [between the Pacific Northwest or Canada and other areas],...which is not required for the transmission of Federal energy [or Canadian Treaty energy], *shall be made available* as a carrier for transmission of other electric energy between such areas.

Emphasis added.

Section 6 of the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. § 838d, provides in full:

> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

Section 9 of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839f (d) provides, in pertinent part, that subject to BPA's contractual obligations, other obligations under existing law, and available federal transmission capacity

> the Administrator shall provide transmission access, load factoring, storage and other services normally attendant thereto to such utilities....

STATEMENT OF THE CASE

The Bonneville Power Administration is a federal agency within the Department of Energy which markets electrical power from the Federal Columbia River power system and provides transmission services for federal and non-federal power.

1. The Intertie

At issue in this case is the Pacific Northwest-Pacific Southwest Intertie, which links the Pacific Northwest with the Pacific Southwest. The Intertie currently consists of three high-voltage transmission lines. BPA owns and operates most of the Intertie north of the Oregon-California and Oregon-Nevada borders. South of Oregon, the Intertie is owned by various California utilities. *See, generally, Department of Water & Power* v. *Bonneville Power Administration*, 759 F.2d 684, 686-87 (9th Cir. 1985), ("*LADWP*").

Congress intended the Intertie to enable power to be sold or exchanged between electric utilities in the two regions. Specifically, as the court recognized in *LADWP*:

> [t]he purpose of the Intertie...is to even out the peaks and troughs in the production and consumption of power between the Northwest and the Southwest. At certain times of year the Northwest produces more electricity than it can use and the Southwest experiences particularly heavy electricity consumption. At other times, the Northwest has heavy demand and the Southwest can produce surplus power. By allowing electricity to flow either north or south, each region can assist the other during times of heavy demand.

CEC App. C-3 (footnote omitted). Within the Pacific Northwest, these electric utilities include not just BPA, but also numerous other publicly-owned and investor-owned utilities such as Puget, which sell, purchase and exchange electric power in transactions with Pacific Southwest utilities. As recognized in *LADWP*, utilities other than BPA produce approximately half of the hydroelectric power sold in the Pacific Northwest. CEC App. C-4.

The Intertie is the only transmission link between the two regions capable of implementing such transactions. As recognized by BPA in its discussion preceding the draft Near Term Intertie Access Policy:

> Federal transmission facilities were constructed, *on the basis of general Pacific Northwest utility consensus*, in

> in order to avoid the costly facility duplication which would result if all utilities in the region were to construct their own facilities.

49 Fed. Reg. 30,346, 30, 349 (July 30, 1984) (emphasis added). BPA acknowledged in the Long Term Intertie Access proceedings that "commenters such as PSP&L [Puget] are correct in observing that the Intertie was envisioned as a resource available to non-federal utilities." CEC App. E-85. BPA's obligations regarding access to the Intertie should therefore be construed in light of this fundamental premise which has historically guided construction and use of the Intertie.

2. BPA's Intertie Access Policies

In September 1984, BPA adopted the first of a series of Intertie access policies, the "Near Term Intertie Access Policy" which was followed by a revised "Near Term" policy in June 1985 and a "Long Term" policy in May 1988. It is the "Long Term Intertie Access Policy" ("LTIAP") which is at issue here. The LTIAP allocates transmission capacity among BPA and other utilities for extraregional energy sales on (1) a short-term hourly basis ("Formula Allocation") and (2) a long-term basis ("Assured Delivery").

3. Formula Allocation

Section 5 of the LTIAP allocates access to the Intertie for short-term sales of energy based on three possible conditions. BPA calls this Formula Allocation. CEC App. E-24, E-35 through 39. Condition 1 applies where the federal hydroelectric system is in spill or "there is a likelihood of spill." CEC App. E-35. Under this condition, BPA and scheduling utilities are allocated capacity in proportion to the declared surplus of each. If, however, BPA is "unable" to sell its own entire allocation (perhaps because it has set its prices too high), BPA "will take larger allocations on ensuing days ..." regardless of whether BPA has consummated actual sales to fill such capacity. CEC App. E-36. The LTIAP thus increases the amount of Intertie capacity allocated to BPA--and hence withdrawn from Northwest utilities--totally without regard to transmission capability actually needed by BPA to transmit its own power sales.[2]

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[2] Similarly, the LTIAP states that under "Condition 2" (near spill) BPA may increase its share of Intertie capacity on ensuing days if its sales drop below 75 percent of its allocation. CEC App. E-36.

This restriction is a naked and illegal denial of transmission capability which violates the mandates of 16 U.S.C. § 837e, that capacity "not required for the transmission of Federal energy....shall be made available as a carrier for transmission" to non-federal utilities and 16 U.S.C. § 838d, that BPA "shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States." *See also* 16 U.S.C. § 839f(d).

The Ninth Circuit recognized in *LADWP* [3] that:

> In allocating Intertie capacity among itself and other Northwest electricity producers, BPA is statutorily required to give itself preference. 16 U.S.C. § 837e. Any capacity in the Intertie "which is not required for the transmission of Federal energy....shall be made available as a carrier for transmission of other electric energy...." *Id.*

CEC App. C-5. The court further noted that "if the agency still has capacity remaining on the Intertie after it has sold available and foreseeable power," it is "required to make the Intertie available to other utilities." CEC App. C-17. The court reasoned:

> The Columbia River Act deals primarily with financing arrangements for BPA. The Act does, however, require BPA to make its facilities available to all utilities fairly once its own needs are satisfied:
>
> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the [Intertie] which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.
>
> 16 U.S.C. § 838d.

CEC App. C-17, C-18.

As noted by the Court in *LADWP*, the legislative history establishes that the BPA Administrator:

> *may not decline* to enter into [agreements to transmit other utilities' power] *merely because he may have energy available for sale to serve the same load.*

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[3] The Ninth Circuit exercises original jurisdiction to review final actions of BPA pursuant to 16 U.S.C. § 839f(e)(5). In *LADWP*, the court reviewed one aspect of the Near Term Policy not relevant here; that policy did not contain the Formula Allocation provisions later added in the LTIAP.

H.R. Rep. No. 590; 1964 U.S. Code Cong. & Ad. News at 3350.

CEC App. C-16 (emphasis added). Thus, Congress has clearly prohibited BPA from refusing to make Intertie capacity available merely because BPA may have "energy available for sale to serve the same load" without the actual prospect of a sale.

LTIAP's Formula Allocation provisions, which allow BPA to harbor Intertie capacity for itself regardless of its actual needs, violate its governing statutes and are wasteful. Indeed, since adoption of LTIAP, BPA has refused to make Intertie capacity available and has let it go unused even as water was spilled past Northwest dams.

The court below acknowledged BPA's duty to make capacity which it cannot use available for sales to others:

> In allocating limited transmission capacity, BPA must give itself priority. 16 U.S.C. § 837e. Nevertheless, it must transmit non-federal power to the extent that the Federal transmission lines have capacity not needed to transmit federal power. *Id.*

CEC App. A-5. The court also observed that "excess capacity is to be made available to non-federal utilities 'on a fair and nondiscriminatory basis,' 16 U.S.C. § 838d." CEC App. A-5, A-6. Yet, in upholding LTIAP's Formula Allocation provisions, the court never addressed the challenge described here (which was presented below); rather, the court focused largely on the California petitioners' allegations that Formula Allocation is anticompetitive. *See* CEC App. A-20 through 25.

BPA's statutory obligations to provide Intertie transmission service must be construed in light of the purposes for which the Intertie was authorized and built. As noted above, the Intertie is a resource constructed on the basis of regional consensus for use by all of the region's utilities on payment of an equitable portion of the cost of the Intertie. Failure by BPA to afford Intertie access on a fair and nondiscriminatory basis in inconsistent with this fundamental premise.

4. Assured Delivery

Section 4 of the LTIAP reserves 800 megawatts ("MW") of Intertie capacity for non-federal long-term transactions. CEC App.

E-29 through 33; E-43, E-44. Of this total, 444 MW are allocated among Pacific Northwest scheduling utilities in the amounts set forth in Exhibit B to the LTIAP. *Id.* at E-43.[4] Puget's allocation of the 444 MW is zero. *Id.*

BPA based the Exhibit B allocation scheme on one past projection (already out of date) of each utility's "average MW firm surplus" for a single year (July 1988 - June 1989), i.e., a forecast from March 1987. *Id.* Under LTIAP, that out-of-date snapshot becomes frozen forever in time since, according to BPA, "[a] utility's Exhibit B [allocation] as set in the Policy cannot increase." CEC App. E-71.

This is arbitrary and unlawful for several reasons. First, the allocation is based on the "average" surplus expected for that year and ignores the peaking or maximum capability of a utility's resources. A utility may, for example, have excess energy which cannot be stored at certain times of the year, but may not have an overall average annual surplus due to lesser energy availability at other times. BPA's own data shows that a utility's available "average firm surplus" varies depending upon whether a year is averaged or whether a smaller portion of a year is considered.[5]

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[4] The balance of the 800 MW is reserved for exchange transactions whereby Northwest utilities transmit power to Southwest utilities at certain times in exchange for a return transmission of energy by Southwest utilities at a future time. CEC App. E-33, E-44.

[5] For example, in the Near Term Intertie Access Policy, BPA's Exhibit B allocations were broken down by "Average [annual] firm surplus" and "Average firm surplus August through December." BPA's own "average surplus" varied between those two catagories by over 1000 MW and the averages of other utilities varied as well. *See* Appendix A hereto. Further, Puget has thermal resources which it historically has not used in the summer; however, over time, Puget may consider using such resources which would change its energy available for sale.

Second, the market and load/resource projections may change dramatically over time, but the allocations are fixed for an indefinite period.[6] Third, the allocation ignores utilities such as Puget which, because they have a resource deficit in the averaged data used by BPA, are allocated zero, even though they are the very utilities which, because of the deficit, need transmission to help meet their loads. (For example, an allocation to Puget could be used for seasonal exchanges which would help Puget meet its loads.) In short, LTIAP's zero Assured Delivery allocation to Puget (merely because the forecast for a single past year used by BPA showed no firm "average" annual energy surplus for Puget) fails to give any consideration to Puget's actual present or future needs. BPA's Assured Delivery limitations hinder or prevent desirable Intertie transactions.

The court below ignored this challenge to the LTIAP's Assured Delivery provisions. These issues were simply not addressed in the court's opinion though they were argued below.

5. Standard of Review

The Ninth Circuit's decision relied heavily upon the court's belief that it was bound to accord substantial deference to BPA's policy. *See, e.g.*, CEC App. A-12, A-13, A-17, A-18, A-28. The court stated that its standard of review was "deferential and presumes the agency action to be valid." CEC App. A-12. The court acknowledged the view of the District of Columbia Circuit in *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987), that "if the agency itself were an interested party...deference might lead a court to endorse self-serving views that an agency might offer...."

The Ninth Circuit in the proceeding below, however, disagreed with the District of Columbia Circuit on two inexplicable grounds.

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[6]In fact, BPA's LITAP Exhibit B designations of "average firm surplus" for some utilities has varied dramatically from that set forth in the Near Term Intertie Access Policy of November 1984. *Compare* CEC App. E-43 with Exhibit B from the 1984 policy (49 Fed. Reg. at 44,238) reproduced at Appendix A hereto. In 1984, seven utilities were allocated zero access as compared to three in 1988. Seattle City Light's 1984 zero allocation rose to 23 MW in 1988. Tacoma City Light's 1984 4 MW allocation rose to 41 in 1988. Exhibit B allocations for many of the other utilities also varied substantially even in those few years. These dramatic changes demonstrate that BPA's permanent allocation of Intertie capacity for long-term sales based on a single year's outdated forecast is unreasonable and arbitrary and capricious.

First, the court stated that "BPA did not draft the LTIAP to maximize its revenues," CEC App. A-13, a fact which has no relevance to whether BPA's interpretation of a statute, drafted for whatever purpose, is tainted by its significant financial self-interest. Second, while rejecting the argument that BPA should be "afforded less deference" (not necessarily no deference) here than in other cases, the court relied on *Aluminum Co. of America v. Bonneville Power Administration*, 891 F.2d 748, 757 n.12 (9th Cir. 1989), *superseded*, 903 F.2d 585 (9th Cir. 1990), *cert. denied*, _____ U.S. _____, 111 S.Ct. 672 (1991), stating that it had there rejected an argument that BPA was entitled to *no* deference. CEC App. A-13. The question of whether less deference may nonetheless be appropriate was simply not addressed.

The Ninth Circuit's application of a highly deferential standard of review is also contrary to this Court's reasoning that such deference is appropriate when the agency interpretation at issue is contemporaneous with the enactment of the statute being interpreted--not one which is at odds with a prior contemporaneous interpretation of the statute.[7] In *Aluminum Co. of America v. Central Lincoln PUD*, 467 U.S. 380, 390 (1984), for example, this Court noted that "[f]ollowing enactment of the statute, the agency *immediately interpreted* the statute in the manner now under challenge,...'a contemporaneous construction'...." (Emphasis added; citations omitted.) Similarly, in *LADWP*, the court applied a highly deferential standard on the assumption that BPA's policy was a " 'contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new' " (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). CEC App. C-14.

LTIAP is not a contemporaneous construction; it is a dramatic departure from BPA's original and long-standing interpretation. The approach taken by BPA at the time it entered into the Exportable Agreement in the 1960s manifested BPA's contemporaneous interpretation of its rights and obligations under legislation authorizing and

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[7]Indeed, it is well settled that where an agency's position has vacillated, deference is inappropriate. *See, e.g., Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d at 1571; *Tennessee Gas Transmission Co. v. FERC*, 789 F.2d 61, 62 (D.C. Cir. 1986).

implementing the Intertie--not the LTIAP (promulgated in 1988).

While certain aspects of the Near Term Intertie Access Policy at issue in *LADWP* did incorporate provisions of the Exportable Agreement (*see, e.g.*, CEC App. C-6), the same is not true of the LTIAP which differs markedly from the Exportable Agreement. Unlike the LTIAP, for example, the Exportable Agreement did not reserve to BPA Intertie capacity for short-term sales regardless of BPA's actual needs and refuse to make such capacity available to others.

The Exportable Agreement was submitted to Congress by the Department of the Interior. CEC App. A-24. As the court below noted, Congress was aware of BPA's policies under the Exportable Agreement even before the Intertie was constructed. CEC App. A-23 n.12. Specifically, a Department of Interior report "informed Congress" that BPA had assured public and private utilities in the Northwest of "markets proportionate to the respective surpluses of the various utilities," CEC App. A-24, an assurance which, for Puget and other Northwest utilities, has been gutted by BPA's changed policies under the LTIAP.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for three reasons. *First*, the Ninth Circuit's application of a highly deferential standard of review to BPA's LTIAP presents a conflict between the circuits. In *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d at 1571, the court described a number of "circumstances in which deference would be inappropriate," and, in particular, explained that "if the agency itself were an interested party...deference might lead a court to endorse self-serving views that an agency might offer...." The Ninth Circuit recognized and quoted the D.C. Circuit's language in this regard, and rejected it stating, "We disagree." CEC App. A-13. *See also* discussion of the general split between the circuits on agency deference in California Energy Commission, *et al.*'s Petition for Writ of Certiorari filed February 4, 1991 (Docket No. 90-1256) at 14-15. Thus, review pursuant to Supreme Court Rule 10.1(a) is appropriate.

Second, the Ninth Circuit's standard of review in this instance also conflicts with this Court's decisions on when agency deference is appropriate. It is clear from this Court's prior decisions that the highly deferential standard applied by the Ninth Circuit in this case is appropriate for agency interpretations which are contemporaneous

constructions of governing statutes. *See, e.g., Aluminum Co. of America v. Central Lincoln PUD*, 467 U.S. at 390 (granting deference where "[f]ollowing enactment of the statute, the agency immediately interpreted the statute in the manner now under challenge,...' a contemporaneous construction'...."); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new"). BPA's contemporaneous construction of its governing statutes with respect to Intertie access was set forth in the Exportable Agreement. The LTIAP departs significantly from the Exportable Agreement in the areas challenged here. Because the LTIAP is not a contemporaneous construction of the statute, the high level of deference accorded to BPA by the Ninth Circuit is inconsistent with this Court's prior decisions. Thus review is appropriate under Supreme Court Rule 10.1(c).

Third, review should be granted in this case because the federal questions st stake are both substantial and recurring. These challenges raise important issues in the administration of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h. *See, e.g., United States v. An Article of Drug, etc.*, 394 U.S. 784, 791 (1969) ("We granted the Government's petition for certiorari because this interpretation of the Act raised issues of importance in the administration of the Federal Fo d, Drug, and Cosmetic Act"). BPA's actions conflict with the plain language of statutes requiring BPA to allow fair and nondiscriminatory access to Northwest utilities for capacity that is not required to transmit BPA sales. Because of BPA's monopoly control over Intertie allocation, and the importance of interregional electrical transmission now and in future years, questions of the appropriate standard of review and the propriety of BPA's allocation policy raise significant federal questions which sharply impact electrical utilities and their customers in the Northwest. Because the LTIAP is in effect indefinitely, and because no utility can obtain access to BPA's Intertie capacity except under BPA's policy, the economic impact of the LTIAP on Puget and other Northwest utilities is particularly harsh. Review pursuant to Supreme Court Rule 10.1(c) is thus appropriate for these reasons.

CONCLUSION

The Court should grant Puget Sound Power & Light Company's Cross-Petition for a Writ of Certiorari.

Respectfully submitted,

March 6, 1991

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APPENDIX A

BPA Near Term Intertie Access Policy, 49 Fed. Reg. 44,232, 44,238 (Nov. 5, 1984)

Exhibit B

Utility	Average firm surplus [1]	Average firm surplus [1] August through December [2]
Bonneville Power Administration.....	1,473	2,651
Seattle City Light.....	0	0
Tacoma City Light.....	4	2
Grant County PUD.....	40	72
Douglas County PUD.....	0	0
Chelan County PUD.....	23	41
Pend Oreille PUD.....	0	0
Eugene Water and Electric Board.....	28	50
Cowlitz County PUD.....	3	5
Snohomish County PUD.....	0	0
Montana Power Company.....	3	5
Idaho Power Company.....	0	0
Pacific Power & Light Company.....	361	650
Portland General Electric Company...	135	243
Puget Sound Power & Light.....	0	0
Utah Power & Light Company.....	0	0
Washington Water Power Company..	53	95

[1] Except that in no operating year may a scheduling utility have Assured Delivery for more energy than the amount of Average Firm surplus shown in Column 1 times the number of hours in the operating year, and except that in the remainder of the 1984-85 operating year no scheduling utility may have Assured Delivery for more than the amount of Average Firm Surplus shown in Column 1 times 6936 hours.

[2] Except that in the months of November and December, when the Exportable Agreement is in effect, the Average Firm Surplus shall be the amount shown in Column 1.

(3) (2)

Nos. 90-1256 and 90-1415

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

CALIFORNIA ENERGY COMMISSION, ET AL., PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

PUGET SOUND POWER & LIGHT COMPANY,
CROSS-PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals, in reviewing the challenge to the Long Term Intertie Access Policy promulgated by the Bonneville Power Administration, properly deferred to the Administrator's construction of the governing statutory scheme under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.*, the Federal Columbia River Transmission System Act, 16 U.S.C. 838 *et seq.*, the Pacific Northwest Consumer Power Preference Act of 1964, 16 U.S.C. 837 *et seq.*, and the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*

2. Whether the court of appeals correctly upheld the Administrator's allocation of access to the Pacific Northwest-Pacific Southwest Intertie, which preferred utilities in the Pacific Northwest over Canadian and other extra-regional utilities.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1256

CALIFORNIA ENERGY COMMISSION, ET AL., PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

No. 90-1415

PUGET SOUND POWER & LIGHT COMPANY,
CROSS-PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 909 F.2d 1298.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. A petition for rehearing was denied on October 5, 1990. Pet. App. D1-D4. On December 21, 1990, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 4, 1991. The petition was filed on that date. The cross-petition for

a writ of certiorari was filed on March 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners and cross-petitioner, various California utility regulatory bodies, several California utilities, and one Washington utility, have challenged the validity of the Long Term Intertie Access Policy promulgated by the Bonneville Power Administration to allocate electric transmission capacity in the Pacific Intertie among various utilities connected to that high voltage energy transmission system.

1. Respondent Bonneville Power Administration (BPA) is an independent, self-financed agency within the United States Department of Energy. BPA markets electric energy generated largely from dams in the Federal Columbia River Power System. As part of that task, BPA operates a large transmission system, including the federal share of the Pacific Intertie, a high voltage electrical energy transmission system connecting BPA and utilities in the Pacific Northwest with utilities in California.[1] Congress approved construction of the Intertie in order to create a market for surplus federal electric power and thereby help BPA repay the federal investment in Northwest hydroelectric facilities. BPA currently owes approximately $8 billion to the United States Treasury. Pet. App. E57.

The Intertie's capacity is finite. As a result, shortly after the Intertie was completed in 1968, BPA and utilities in the Pacific Northwest entered into an agreement regarding short-term allocation of BPA's Intertie capacity—the

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[1] BPA controls a majority of the Intertie north of the Oregon-California border. California utilities, including petitioners Pacific Gas & Electric Company and Southern California Edison Company, own and control the southern portion of the Intertie. Pet. App. E58.

Exportable Agreement of 1969. The Agreement was based on the following fundamental characteristic of the power generation system. The ability of a hydroelectric dam to store energy in the form of water is limited to the capacity of the reservoirs behind the dams. When river flows are high, reservoirs full, and markets not available, "spill"—the flow of excess water past turbines without the generation of energy—takes place and results in the loss of the electrical generation capacity of the spilled water. The Agreement therefore allocated federal Intertie capacity on a pro rata basis among BPA and Pacific Northwest generating utilities for surplus energy that might otherwise be wasted because of the need to spill.[2] When a spill was threatened, the Agreement reserved federal Intertie capacity for the use of BPA and Pacific Northwest generators. At these times, the Agreement excluded extra-regional utilities, including Canadian sources, from access to the Intertie. Pet. App. C6.

2. In the early 1980s, an unexpected increase in the availability of surplus power in the Pacific Northwest and elsewhere, together with a significant downturn in BPA's finances, prompted BPA to reexamine the allocation of Intertie capacity. Pet. App. E3-E4. As a result, BPA initiated the extensive administrative process that ultimately led to the final Long Term Intertie Access Policy (LTIAP) at issue here.

In 1984, after public hearings and opportunity for comment, BPA promulgated the Interim Near Term Access Policy. That policy included a formula allocation provision

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[2] Section 1(b) of the Pacific Northwest Consumer Power Preference Act of 1964 (Preference Act), 16 U.S.C. 837(b), defines the Pacific Northwest to include Oregon, Washington, and portions of Montana, Nevada, Utah, Wyoming, and Idaho. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839a(14)(A), later included the entire State of Idaho.

governing short-term surplus sales. Pet. App. C9-C10. In relevant part, that provision incorporated the pro rata allocation of the Exportable Agreement in times of spill. *Id.* at C10 (Condition 1). Where spill was not threatened, but where BPA and Northwest utilities had hourly surplus power exceeding available federal Intertie capacity, that capacity was allocated according to a ratio that approximated each party's surplus to the sum of all declared surplus *Id.* at C11-C12 (Condition 2). Where spill was not threatened and where declared surplus in the region did not exceed the available capacity of the federal Intertie, each Northwest party was permitted access to the Intertie to the full extent of its surplus, and any remaining capacity was made available for Canadian and other extra-regional utilities. *Id.* at C10-C11 (Condition 3).

Petitioner Department of Water and Power of the City of Los Angeles challenged BPA's Interim Near Term Access Policy, including its provisions excluding Canadian power other than in Condition 3. In *Department of Water & Power* v. *Bonneville Power Admin.* (*LADWP*), 759 F.2d 684 (9th Cir. 1985) (Pet. App. C1-C24), the court of appeals rejected that challenge, concluding that BPA may properly allocate its Intertie capacity on a pro rata basis and that BPA may prefer itself and Pacific Northwest utilities over Canadian and other extra-regional utilities. As the court explained, "Congress intended that the Intertie be used primarily for the benefit of Northwest and Southwest utilities and not for the benefit of Canadian utilities." Pet. App. C22.

3. Following the development of the Interim Policy, BPA continued with its extensive administrative process and promulgated the Near Term Intertie Access Policy in 1985. In relevant part, the Near Term Policy carried forward the allocation scheme under the three Conditions established by the Interim Near Term Policy. Pet. App. B5-B6. Peti-

tioners California Energy Commission (CEC) and California Public Utilities Commission (CPUC) promptly challenged the Near Term Policy. Petitioners contended that BPA exceeded its authority by allocating Intertie access on a pro rata basis and that, under 16 U.S.C. 837e and 838d, BPA could not limit access by Canadian and extra-regional utilities.

On the basis of its earlier *LADWP* decision, the court of appeals rejected petitioners' challenge, holding that BPA's allocation scheme and preference for Northwest utilities were lawful. *California Energy Resources Conservation & Dev. Comm'n* v. *Bonneville Power Admin.* (*CEC I*), 831 F.2d 1467 (9th Cir. 1987) (Pet. App. B1-B25), cert. denied, 488 U.S. 818 (1988).

4. In May 1988, after further administrative proceedings, BPA adopted the final Long Term Intertie Access Policy (LTIAP). In relevant part, BPA adhered to the basic short-term allocation scheme contained in the prior policies. Under Condition 1, which obtains during periods of threatened spill, the Intertie's available capacity is allocated on an hourly pro rata basis among BPA and those Northwest utilities declaring surplus power. Pet. App. E6-E10. Under Condition 2, which obtains during periods when the declared supply of surplus energy in the Northwest exceeds Intertie capacity, the Intertie's capacity is allocated on that same pro rata basis. *Id.* at E11. Under Condition 3, which obtains "when the declarations of BPA and Northwest utilities are less than Intertie capacity," *ibid.*, access by BPA and the Northwest utilities for their declared surplus amounts is unrestricted, with Canadian utilities and others permitted access to any remaining capacity, *id.* at E11-E12.

Petitioners, including cross-petitioner (collectively petitioners), and others had complained to BPA that the hourly allocation scheme under the proposed LTIAP unnecessarily limited competition. As a result, BPA's final

LTIAP suspended the operation of the Conditions 2 and 3 allocations in favor of an 18-month experiment where no individual nonfederal allocations would be made after BPA received its allocation. Instead, under Condition 2, all short-term capacity not used by BPA would be made available to the Northwest utilities as a block, to be allocated on a first-come, first-served basis to those utilities arranging transactions with California utilities. This allocation for Northwest utilities would also obtain under Condition 3; any remaining capacity would be made available to Canadian and other extra-regional utilities. As it turned out, water levels allowed the experiment to proceed on only 20 days out of the originally planned 18-month period. BPA has thus extended the experiment until September 1991, in order to gather more data. See 55 Fed. Reg. 13,824 (1990).

In the meantime, petitioners and others challenged the LTIAP before the court of appeals under 16 U.S.C. 839f(e)(5). They contended, among other claims, that BPA's construction of the governing statutory scheme should not be accorded substantial deference "because it has an economic interest in obtaining a larger share of the economic benefits of the interregional transactions." Pet. App. A13. On the merits, petitioners argued that the LTIAP unlawfully discriminates against Canadian power, contrary to the provisions of the Federal Columbia River Transmission System Act (Transmission Act) and the Preference Act. See 16 U.S.C. 837e, 838d.

5. In July 1990, the court of appeals "conclude[d] that BPA's actions and decisions in developing the LTIAP were not arbitrary and capricious and [therefore] affirm[ed] the LTIAP in its entirety." Pet. App. A36. Following *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984), the court of appeals concluded that "[b]ecause BPA drafted the Northwest

Power Act, its interpretation of the Act is to be given 'great weight' and should be upheld if reasonable." Pet. App. A12. The court disagreed with petitioners' suggestion that BPA should not receive such deference "because it has an economic interest" in the subject matter under review. *Id.* at A13. As the court explained, "BPA did not draft the LTIAP to maximize its revenues," and it had previously "rejected the argument that BPA is entitled to no deference in ratemaking decisions, even where it has an interest in the outcome." *Ibid.* (citing *Aluminum Co. of America* v. *Bonneville Power Admin.*, 891 F.2d 748, 757 n.12 (9th Cir. 1989)). Turning to petitioners' substantive attack on the LTIAP, the court pointed out that it had previously reviewed and rejected that contention in *LADWP*, 759 F.2d at 693-694 (Pet. App. C20-C22). The court therefore reaffirmed that ruling. Pet. App. A25-A26 & n.14.

ARGUMENT

1. Petitioners contend that the court of appeals erred in deferring to BPA's construction of the governing statutory scheme, where the agency has a "direct and immediate financial interest in [its] own decision[]." Pet. 13; Cross-Pet. 11-12. As an initial matter, petitioners overstate the circumstances under which BPA operates. First, as the court of appeals expressly found, "BPA did not draft the LTIAP to maximize its revenues." Pet. App. A13. Second, petitioners' branding of BPA as "proprietary" (Pet. 13) is a mischaracterization. Although BPA is self-financed and not funded by tax revenues, it is not a profit-making firm. Rather, Congress expressly charged the agency with maintaining "the lowest possible rates to consumers consistent with sound business principles," 16 U.S.C. 838g, while at the same time directing it to recover costs and make timely

repayment of the $8 billion federal investment in the Co-lumbia River Power System.[3]

In any event, this Court's decision in *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984) (*ALCOA*), forecloses petitioners' contention. There, BPA specifically informed the Court of its substantial financial stake in the statutory question at issue. See Brief for Federal Respondent at 19, *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, No. 82-1071. Nonetheless, this Court held that "[u]nder established administrative law principles, it is clear that the Administrator's interpretation of the [Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.*,] is to be given great weight." *ALCOA*, 467 U.S. at 389.

Petitioners' claim (Pet. 13-14; Cross-Pet. 11) that the court of appeals' decision conflicts with *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563 (D.C. Cir. 1987), is insubstantial. The isolated statement petitioners seize upon—that "deference would be inappropriate * * * if the agency itself were an interested party to the [settlement] agreement," *id.* at 1571—has no application here. BPA is not construing an agreement between private parties; BPA is construing its own governing statutory scheme. Indeed, the statement petitioners trumpet had no application to the case before the D.C. Circuit. There, the court of appeals reviewed FERC's construction of a settlement agreement to which the agency was not a party. In those circumstances, given the agency's acknowledged expertise and the fact that

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[3] Petitioners thus mistakenly suggest (Pet. 15) that BPA operates as a traditional business, as do other independent government corporations, such as the Federal Home Loan Mortgage Corporation, see 12 U.S.C. 1452-1455, and the Student Loan Marketing Association, see 20 U.S.C. 1087-2.

"Congress required the Commission to take an active role in approving [settlement] agreement[s]," *ibid.*, the D.C. Circuit did not hesitate to defer to FERC's reading of the agreement at issue, *id.* at 1568-1572. That is precisely what the court of appeals did here.

Petitioners' suggestion (Pet. 14-15; Cross-Pet. 11-12) that the courts of appeals are divided over whether an agency is entitled to deference when construing the scope of its own jurisdiction is similarly unpersuasive. This Court has consistently deferred to agencies' determinations regarding their statutory jurisdiction. See, *e.g.*, *Massachusetts* v. *Morash*, 490 U.S. 107, 114-118 (1989); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 114-116 (1988); *NLRB* v. *Food & Commercial Workers Local 23*, 484 U.S. 112, 123-128 (1987); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125-126 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Indeed, as Justice Scalia recently stated, "it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (concurring in the judgment); see *Dole* v. *United Steelworkers*, 110 S. Ct. 929, 944 (1990) (White, J., dissenting). For that reason, the lower courts have had little difficulty applying that principle of administrative law. See, *e.g.*, *Puerto Rico Maritime Shipping Auth.* v. *Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988); *Wyckoff Co.* v. *EPA*, 796 F.2d 1197, 1200-1201 (9th Cir. 1986).

Finally, petitioners' assertion (Pet. 14) that decisions of the D.C. and Eighth Circuits conflict with this approach

lacks foundation. In *Ohio Power Co.* v. *FERC*, 880 F.2d 1400 (D.C. Cir. 1989), rev'd on other grounds *sub nom. Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990), the court of appeals declined to defer to the agency's interpretation *not* because the statute at issue involved the agency's jurisdiction, but rather because the agency itself claimed no such deference since that statute "cannot be said to be entrusted to FERC's administration." 880 F.2d at 1405.[4] And in *Missouri* v. *Andrews*, 787 F.2d 270 (8th Cir. 1986), aff'd on other grounds *sub nom. ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988), the court of appeals refused to defer to the Secretary of the Interior's construction of Section 9(c) of the Flood Control Act because the court of appeals' "review of the Act and its legislative history convince[d] [the court] that Congress did not intend to grant the Secretary * * * the authority [at issue]." 787 F.2d at 287. That decision, contrary to petitioners' suggestion, is merely a straightforward application of the *Chevron* framework.

2. Turning to the merits of the underlying controversy, petitioners contend (Pet. 16-21) that the court of appeals erred in upholding the Administrator's allocation of access to the Pacific Northwest Pacific-Southwest Intertie, which preferred utilities in the Pacific Northwest over Canadian and other extra-regional utilities. In petitioners' view, Section 6 of the Preference Act, 16 U.S.C. 837e, and Section 6 of the Transmission Act, 16 U.S.C. 838d,[5] mandate

[4] Similar reasoning accounts for the court of appeals' declining to defer to the agency's construction of the statute at issue in *New York Shipping Ass'n* v. *Federal Maritime Comm'n*, 854 F.2d 1338, 1362 (D.C. Cir. 1988) ("We note with interest that this is not a case in which the Commission lays claim to any deference for its interpretation.").

[5] Section 6 of the Pacific Northwest Consumer Power Preference Act of 1964, 16 U.S.C. 837e, provides in pertinent part:

> Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the

that BPA give Canadian and other extra-regional utilities the same Intertie access as nonfederal Pacific Northwest utilities to arrange transactions with California utilities.[6]

a. Congress enacted the Preference Act in 1964 as part of the legislative package authorizing construction of the Intertie. See Pub. L. No. 88-257, 77 Stat. 844 (1963); Pub. L. No. 88-511, 78 Stat. 682 (1964). On its face, Section 6 of the Preference Act requires BPA to make excess capacity "available as a carrier." 16 U.S.C. 837e. Under the LTIAP, BPA makes available excess Intertie capacity as a

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> Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas.

Section 6 of the Federal Columbia River Transmission System Act, 16 U.S.C. 838d, provides:

> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

[6] Cross-petitioner Puget Sound Power & Light Company challenges (Cross-Pet. i) BPA's allocation of "Assured Delivery" amounts among Pacific Northwest utilities. That challenge is groundless. Under the Assured Delivery provisions of the LTIAP, each utility granted an Assured Delivery allocation is guaranteed access to the Intertie in the amount allocated in order to permit firm power sales. Unallocated Assured Delivery capacity remains available for seasonal exchanges of power. BPA did not grant cross-petitioner an Assured Delivery allocation because that utility did not have any average firm surplus power that could be used for firm sales. See Pet. App. E169-E170. Nonetheless, BPA agreed to review cross-petitioner's complaint upon completion of the planned third Intertie. *Id.* at E71. In the meantime, cross-petitioner,

carrier for transmission of energy for the Northwest utilities and others. That is all that the statute requires. Contrary to petitioners' submission, the plain terms of 16 U.S.C. 837e do not circumscribe the Administrator's discretion in allocating excess Intertie capacity and do not require BPA to transmit Canadian power on the same terms as Northwest power.

Even if resort to the legislative record were appropriate, that record fully supports the decision below. The House Report states that the Administrator "may" enter into agreements for the wheeling of energy generated in Canada. H.R. Rep. 590, 88th Cong., 1st Sess. 9 (1963); see also S. Rep. No. 122, 88th Cong., 1st Sess. 12 (1963). Although petitioners point out (Pet. 18) that the House Report states that non-Treaty Canadian power "stands on the same basis as any other non-Federal energy," H.R. Rep. 590, *supra*, at 9, the very next sentence makes plain that this statement merely distinguishes non-Treaty Canadian power from the priority access granted to Canadian Treaty power by statute. See 16 U.S.C. 837h.[7] In context, therefore, the Report does

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along with other utilities, may seek to obtain Assured Delivery for seasonal exchanges. *Id.* at E162-E171.

Cross-petitioner also challenges in passing (Cross Pet. 5-7) the Condition 1 "true-up" mechanism that retains any unused BPA allocations for later BPA use. Because the unsold federal energy represented by the unused allocations is likely being retained behind the federal dams, the need for that Intertie capacity continues through time. Failure to incorporate such a mechanism could increase the amount of spill on the federal hydroelectric system. Pet. App. E88-E89. The true-up mechanism therefore properly ensures that federal needs have priority use of the Intertie.

[7] So-called "Canadian Treaty power" refers to Canada's share of power generated at hydroelectric facilities in the Pacific Northwest as

not suggest that Canadian power must be given the same access as that afforded to Pacific Northwest utilities.[8]

BPA's contemporaneous construction of the statute further suggests that Congress had no intention of treating non-Treaty Canadian power on the same basis as Northwest power. The Department of the Interior (BPA's parent agency at that time) reported to Congress that "BPA has assured the public and private utilities *of its service area* access over [BPA's] lines to California, Nevada, and Arizona markets." U.S. Dep't of the Interior, *Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest* 27 (Comm. Print 1964) (emphasis added). And in recommending enactment of the Preference Act, the Conference Committee expressly endorsed that report. H.R. Conf. Rep. No. 1822, 88th Cong., 2d Sess. 3-4 (1964). Moreover, BPA's first implementations of the legislation—the Exportable Agreement and other Intertie agreements—were each limited to Northwest and Southwest utilities and did not include any Canadian utility. And the Secretary of the Interior transmitted these agreements—including the provisions regarding pro rata allocations—to Congress.

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a result of the increased water flows from the Canadian reservoirs built in conjunction with the Treaty. Canada is entitled to one half of this generation. See Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, United States-Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638. BPA must provide priority intertie access for Canadian Treaty power sold to California utilities. No such transactions currently exist, however. See *LADWP*, 759 F.2d at 694 n.15.

[8] Indeed, throughout the legislative record, descriptions of the benefits accruing from an intertie system focused on benefits flowing to the Pacific Northwest and the Pacific Southwest. See H.R. Conf.

b. Petitioners fare no better in invoking the "plain language" (Pet. 16) of Section 6 of the Transmission Act, 16 U.S.C. 838d. As the prefatory provision of the Act makes clear, Congress enacted the statute "in order to enable the Secretary of the Interior to carry out the policies of [the Preference Act] relating to the marketing of electric power from hydroelectric projects *in the Pacific Northwest*." 16 U.S.C. 838(a) (emphasis added). In other words, Congress identified Pacific Northwest power as the intended beneficiary of the Act. Indeed, petitioners' construction would create serious anomalies in the statutory scheme. For example, Congress has imposed several limitations to insure that the benefits of Northwest power are made available primarily to the Pacific Northwest area. See, *e.g.*, 16 U.S.C. 837b(a) (BPA must stop sales of surplus energy to California if Northwest needs the power); 16 U.S.C. 837b(d) (nonfederal Northwest utilities making firm sales to California have limited ability to rely on BPA's firm sales). Under petitioners' "equal access" theory, Canadian power would not be subject to these limitations and, as a result, would presumably have a competitive advantage.

The legislative record confirms that Congress enacted Section 838d in order to clarify BPA's obligation to treat public and private utilities alike in granting access to its transmission system. See H.R. Rep. No. 1375, 93d Cong., 2d Sess. 5 (1974); see also S. Rep. No. 1030, 93d Cong., 2d Sess. 9 (1974) (BPA's obligation is limited to transmitting power "in and from the Pacific Northwest."). The statutory provision thus stands in contrast to BPA's obligation – as a

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Rep. No. 1822, 88th Cong., 2d Sess. 7 (reprinting letter from Secretary of Interior); H.R. Rep. No. 590, *supra*, at 2; U.S. Dep't of the Interior, *Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest* 32 (Comm. Print 1964).

seller of Federal power—"at all times * * * [to] give preference and priority to public bodies and cooperatives." 16 U.S.C. 832c(a). Congress inserted the Transmission Act's "fair and nondiscriminatory" language to preclude preference utilities from asserting that they had priority over investor-owned utilities to BPA's transmission services. See H.R. Rep. No. 1375, *supra*, at 5.[9]

3. Finally, petitioners' complaint (Pet. 21-23) that the LTIAP transfers substantial wealth from California utilities to the Pacific Northwest is premature. BPA adopted the policy based on its considered judgment that the LTIAP could be expected to divide the benefits of the Intertie in roughly equal proportions between the two regions. Pet. App. E247. Nonetheless, in response to comments by petitioners and others, BPA incorporated an experiment in the LTIAP to test the impact of more open competition among nonfederal Northwest utilities in Condition 2 and among all utilities in Condition 3. See Pet. App. E10-E12, E37-E38.

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[9] Moreover, despite oversight hearings on BPA's pertinent Intertie access policies, Congress has not expressed opposition to them. See *Oversight Hearings on Intertie Access Policy of the Bonneville Power Administration Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 100th Cong., 1st Sess. (1987); *Oversight Hearing on Potential Impacts of the Proposed U.S.-Canada Free Trade Agreement on California and Pacific Northwest Power Resources Before the Subcomm. on Water and Power of the House Comm. on Interior and Insular Affairs*, 100th Cong., 2d Sess. (1988). Congress's failure to revise or repeal those policies construing the governing statutory scheme "is persuasive evidence that the interpretation is one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)).

BPA has since extended this experiment to October 1, 1991, in order to gather more data. See 55 Fed. Reg. 13,824 (1990). In these circumstances, petitioners' complaint here seeks to sidestep BPA's ongoing efforts to minimize any unnecessary economic upheaval.[10]

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners gloss over the fact that, in addition to the rights provided to Canadian power in Condition 3, the LTIAP provides opportunities for transmission of firm Canadian power to California utilities. Pet. App. E38-E39, E196-E197.

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